

U.S. Circuit and District Court Nominations During the Obama Presidency: Midyear Analysis and Comparison with Recent Presidents

June 30, 2014

Congressional Research Service

<https://crsreports.congress.gov>

R43624

Summary

The nomination and confirmation process for U.S. circuit and district court judges is of ongoing interest to Congress. Recent Senate debates over judicial nominations have focused on issues such as the relative degree of success of President Barack Obama's nominees in gaining Senate confirmation compared with other recent Presidents, as well as the pace of confirmation of his nominees compared to the nominees of other recent Presidents, and the relative prevalence of vacant judgeships compared to years past.

This report addresses these issues by providing a statistical analysis of nominations to U.S. circuit and district court judgeships from January 20 of President Obama's first year in office to June 30 of his sixth year, and by comparing statistics during this period of the Obama presidency to statistics from comparable periods of time during the presidencies of his two most recent predecessors. Some of the report's findings include the following:

- Of President Obama's 59 circuit court nominees, 49 (83.1%) have, thus far, been confirmed. The 49 confirmed nominees and 83.1% confirmation rate represent the highest number and percentage of circuit court nominees confirmed, during the three most recent presidencies, from January 20 of a President's first year in office to June 30 of his sixth year. G.W. Bush had the lowest percentage of circuit court nominees confirmed (68.7%) during the comparable period of time of his presidency, while President Clinton had the lowest number confirmed (44).
- Of the 253 persons nominated by President Obama to U.S. district court judgeships, 219 (86.6%) have been confirmed. Of the three Presidents, this was both the second-highest number and percentage of district court nominees confirmed. Of the comparison group, President Clinton had the greatest number of district court nominees confirmed between January 20 of his first year and June 30 of his sixth year (222), while President G.W. Bush had the greatest percentage of district court nominees confirmed (91.3%).
- Overall, combining nominees to both circuit and district court judgeships, President Obama has had, as of June 30 of his sixth year in office, approximately the same percentage of nominees confirmed as President G.W. Bush (85.9% and 86.0%, respectively). President Obama, however, has had the greatest number of nominees confirmed (268), while President G.W. Bush had the fewest number of nominees confirmed (246). President Clinton had the second-highest number of nominees confirmed (266) and the lowest percentage confirmed (81.1%).
- During the Obama presidency the Senate has confirmed, on average, 4.5 circuit court nominees every six months. Of the comparison group, this is the highest number of circuit court nominees confirmed, on average, every six months. For Presidents G.W. Bush and Clinton, the number of circuit court nominees confirmed, on average, per six-month period was 4.2 and 4.0, respectively.
- During the Obama presidency, as of June 30, 2014, the Senate has confirmed, on average, 19.9 district court nominees every six months. Of the comparison group, this is the second-highest number of district court nominees confirmed, on average, every six months. For Presidents G.W. Bush and Clinton, the number of district court nominees confirmed, on average, per six-month period was 18.2 and 20.2, respectively.
- Overall, from January 20 of his first year to June 30 of his sixth year, President Obama had 24.4 circuit and district court nominees confirmed, on average, per

six-month period. This was the highest number of nominees confirmed, on average, per six-month period during the three presidencies. The comparable statistics for Presidents G.W. Bush and Clinton were 22.4 and 24.2, respectively.

- The percentage of vacant circuit and district court judgeships declined from January 1 of President Obama's fifth year in office to June 30 of his sixth year. The percentage of vacant judgeships also declined over the same period during the Clinton presidency, while the percentage of vacancies increased during the same period of the G.W. Bush presidency.

Contents

Introduction	1
Number and Percentage of Confirmed Judicial Nominees	3
U.S. Circuit Court Nominees	4
Confirmation of U.S. Circuit Court Nominees During a President's Sixth Year	5
U.S. District Court Nominees	5
Confirmation of U.S. District Court Nominees During a President's Sixth Year	5
U.S. Circuit and District Court Nominees (Combined)	6
Total Nominees Confirmed During a President's Sixth Year	6
Pace of Confirmation of Judicial Nominees	6
U.S. Circuit Court Nominees	8
U.S. District Court Nominees	9
U.S. Circuit and District Court Nominees (Combined)	11
Judicial Vacancies.....	11
U.S. Circuit Court Vacancies.....	12
U.S. District Court Vacancies.....	12

Figures

Figure 1. Number of U.S. Circuit Court Nominees Confirmed, On Average, Per Six-Month Period During First and Second Presidential Term.....	9
Figure 2. Number of U.S. District Court Nominees Confirmed, On Average, Per Six-month Period During First and Second Presidential Term	10

Tables

Table 1. U.S. Circuit and District Court Nominees: Number Nominated, Number Confirmed, and Percentage Confirmed	4
Table 2. Percentage of U.S. Circuit and District Court Judgeships Vacant on January 1 of President's Fifth Year in Office and June 30 of Sixth Year in Office.....	12

Contacts

Author Information.....	13
-------------------------	----

Introduction

Article III, Section I, of the Constitution provides, in part, that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” It further provides that Justices on the Supreme Court and judges on lower courts established by Congress under Article III have what effectively has come to mean life tenure, holding office “during good Behaviour.”¹ Along with the Supreme Court, the courts that constitute the Article III courts in the federal system are the U.S. circuit courts of appeals, the U.S. district courts, and the U.S. Court of International Trade.²

This report concerns nominations made by President Obama and other recent Presidents to the U.S. circuit courts of appeals and the U.S. district courts.³ Outside the report’s scope are the occasional nominations that these Presidents made to the Supreme Court and the U.S. Court of International Trade.⁴

In recent Congresses, there has been ongoing interest in the process by which U.S. circuit and district court judges are nominated by the President and approved by the Senate. During Senate debates over judicial nominations, differing perspectives have been expressed about the relative degree of success of a President’s nominees in gaining Senate confirmation, compared with the nominees of other recent Presidents.⁵ Additionally, Senate debate often has concerned the pace by which the Senate has considered or approved a President’s judicial nominees.⁶ Of related concern to Congress has been the percentage of vacant judgeships in the federal judiciary and the effect of delays in the processing of judicial nominations on filling vacancies.⁷

¹ Pursuant to this constitutional language, Article III judges may hold office for as long as they live or until they voluntarily leave office. A President has no power to remove them from office. Article III judges, however, may be removed by Congress through the process of impeachment by the House and conviction by the Senate.

² The U.S. Court of International Trade is a nine-member court with nationwide jurisdiction over civil actions arising out of the customs and international trade laws of the United States.

³ The U.S. courts of appeals take appeals from federal district court decisions and are also empowered to review the decisions of many administrative agencies. Altogether, 179 appellate court judgeships for 13 courts of appeals are currently authorized by law. In this report, nominations to U.S. courts of appeals judgeships are frequently referred to as “circuit court nominations.” U.S. district courts are the federal trial courts of general jurisdiction. Altogether, 673 Article III U.S. district court judgeships are currently authorized by law. For further background information on U.S. courts of appeals and district courts, see CRS Report R43058, *President Obama’s First-Term U.S. Circuit and District Court Nominations: An Analysis and Comparison with Presidents Since Reagan*, by Barry J. McMillion.

⁴ The scope of this report also does not include the relatively rare nominations made by a President to territorial district court judgeships, which were established by Congress pursuant to its authority to govern the territories under Article IV of the Constitution. The three U.S. territorial courts are located in Guam, the Northern Mariana Islands, and the U.S. Virgin Islands. Judges confirmed to these courts serve 10-year terms (rather than “during good Behaviour”). Like Article III courts, territorial courts hear cases arising out of federal law, their decisions may be appealed to a U.S. circuit court of appeals, and their judicial nominations are referred to the Senate Judiciary Committee.

⁵ See, for example, Sen. Patrick J. Leahy, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, September 9, 2013, p. S6285. See also Sen. Chuck Grassley, “Nominations,” Remarks in the Senate, *Congressional Record*, daily edition, May 5, 2014, p. S2635.

⁶ See, for example, Sen. Patrick J. Leahy, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, February 25, 2013, p. S804. See also Sen. Chuck Grassley, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, April 18, 2013, p. S2783; Sen. Orrin Hatch, “Confirmation Process,” Remarks in the Senate, *Congressional Record*, daily edition, June 19, 2013, p. S4637.

⁷ See, for example, Sen. Patrick J. Leahy, “Judicial Nominations in 2013,” Remarks in the Senate, *Congressional Record*, daily edition, December 20, 2013, p. S9092. Concern over judicial vacancies has also been expressed by Chief Justice John G. Roberts, Jr., and by his predecessor, Chief Justice William Rehnquist. Chief Justice Roberts, noting that

In light of continued Senate interest in the judicial selection and confirmation process, this report seeks to inform Congress by (1) comparing the number and percentage of judicial nominees confirmed during the first five and a half years of the Obama presidency with the number and percentage of nominees confirmed during the same period of time during the G.W. Bush and Clinton presidencies; (2) comparing the pace of judicial confirmations during the Obama presidency as well as during the G.W. Bush and Clinton presidencies; and (3) providing statistics related to vacancies existing at the beginning of each President's second term and on June 30 of each President's sixth year in office.⁸

The period of time for each presidency analyzed in the report is from January 20 of a President's first year in office to June 30 of his sixth year in office. So, for example, the statistics reported below for President Obama reflect the period from January 20, 2009, to June 30, 2014.⁹ This includes the period following the Senate's reinterpretation, on November 21, 2013, of the application of Senate Rule XXII to floor consideration of some presidential nominations (including nominations to U.S. circuit and district court judgeships). Specifically,

For nominations other than to the Supreme Court, the new precedent lowered the vote threshold by which cloture can be invoked—from three-fifths of the Senate to a simple majority of those voting, thereby enabling a supportive majority to reach an 'up-or-down' vote on confirming a nomination.¹⁰

The statistics reported below for the Obama presidency include all nominations and confirmations that occurred on or before June 30, 2014.¹¹

Please note that the purpose of this midyear report is to provide an overview and analysis of the number and percentage of U.S. circuit and district court nominees confirmed as of June 30 of President Obama's sixth year in office (and how such statistics compare to the number and percentage of nominees confirmed during the G.W. Bush and Clinton presidencies), while also providing information related to the pace of Senate approval of judicial nominees as well as

vacancies are not evenly distributed across judicial districts, has stated that "a persistent problem has developed in the process of filling judicial vacancies.... This has created acute difficulties for some judicial districts. Sitting judges in those districts have been burdened with extraordinary caseloads." Chief Justice John G. Roberts, Jr., "2010 Year-End Report on the Federal Judiciary," January 2011, <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>. Similarly, former Chief Justice Rehnquist argued that "[j]udicial vacancies can contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed. Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary." Chief Justice William Rehnquist, "1997 Year-End Report on the Federal Judiciary," Third Branch, January 1998.

⁸ For a discussion of the various factors which might help explain differences or variation found in judicial nominations statistics and judicial vacancies across presidencies, see CRS Report R43058, *President Obama's First-Term U.S. Circuit and District Court Nominations: An Analysis and Comparison with Presidents Since Reagan*, by Barry J. McMillion.

⁹ The statistics reported for President G.W. Bush reflect the period from January 20, 2001, to June 30, 2006, and the statistics reported for President Clinton reflect the period from January 20, 1993, to June 30, 1998.

¹⁰ Note, however, that reaching a confirmation vote on a nomination still requires unanimous consent or a successful cloture process. For additional information on the reinterpretation of the application of Senate Rule XXII to presidential nominations, see CRS Report R43331, *Majority Cloture for Nominations: Implications and the "Nuclear"* *Proceedings*, by Valerie Heitshusen.

¹¹ Consequently, the most recent nominations included in the analysis are those of Madeline Cox Arleo (District of New Jersey), Amos L. Mazzant, III (Eastern District of Texas), Robert Lee Pitman (Western District of Texas), and Robert W. Schroeder, III (Eastern District of Texas). Each of these nominations was submitted to the Senate on June 26, 2014. The most recent confirmations included in the analysis are those of Geoffrey W. Crawford (District of Vermont), Beth Bloom (Southern District of Florida), Carlos E. Mendoza (Middle District of Florida), and Paul G. Byron (Middle District of Florida). Each of these nominations was approved by the Senate on June 24, 2014.

judicial vacancies. Consequently, this report does not include other statistics focused on specific stages of the appointment process, such as the length of time it has taken President Obama and his predecessors to nominate individuals to vacant circuit and district court judgeships, or how long it takes nominees to advance through the Senate confirmation process (e.g., the length of time from nomination to committee hearing or from committee report to final Senate action).¹² Such statistics are analyzed in a longer end-of-year report that tracks the progress of a particular President's judicial nominees in receiving Senate confirmation.¹³

Number and Percentage of Confirmed Judicial Nominees

This section of the report compares, for Presidents Obama, G.W. Bush, and Clinton, the total number of U.S. circuit and district court nominees submitted to the Senate from January 20 of a President's first year in office to June 30 of his sixth year in office, as well as the number and percentage of circuit and district court nominees whose nominations were confirmed by the Senate during this same period.¹⁴ While Presidents sometimes nominate particular individuals to a court more than once, **Table 1** counts such nominees only once. In other words, the analysis below does not account for multiple nominations of the same individual to the same court.¹⁵

Different institutional and political factors are responsible for variation across presidencies in the number and percentage of U.S. circuit and district court nominees confirmed by the Senate.¹⁶ Additionally, a judicial nomination may fail to receive Senate confirmation because (1) the full Senate votes against the nomination; (2) the President withdraws the nomination, either because the Senate Judiciary Committee (i) has voted against reporting it favorably, (ii) had made clear its intention not to act on the nomination, (iii) because the nomination, even if reported, is likely to face substantial opposition on the Senate floor, or (iv) the nominee himself or herself has requested that the nomination be withdrawn; or (3) the Senate, without confirming or rejecting the nomination, returns the nomination to the President under Rule XXXI, paragraph 6 of the

¹² Such statistics, however, are available to congressional clients from the author upon request.

¹³ CRS releases a comprehensive "tracking" report at the end of a calendar year which tracks the progress of a particular President's judicial nominees in receiving Senate confirmation. The tracking report provides additional comparative statistics with a President's recent predecessors, including the length of time it takes nominees to receive a hearing before the Judiciary Committee or to receive an up-or-down vote by the full Senate after having their nomination reported by the committee. For the most recent tracking report, released on January 24, 2014, see CRS Report R43369, *U.S. Circuit and District Court Nominations During President Obama's First Five Years: Comparative Analysis With Recent Presidents*, by Barry J. McMillion.

¹⁴ Most of the statistics presented and discussed in this report were generated from an internal CRS judicial nominations database. Other data sources, however, are noted where appropriate. As mentioned above, the statistics account only for nominations made to U.S. circuit and district court judgeships.

¹⁵ Not included as a confirmed nominee is any individual who received a recess appointment by the President and who was not subsequently confirmed by the Senate prior to June 30 of that same President's sixth year in office. So, for example, Charles W. Pickering, Sr., received a recess appointment by President G.W. Bush to the U.S. Court of Appeals for the Fifth Circuit on January 16, 2004. Mr. Pickering was not ultimately confirmed by the Senate and his judicial service ended on December 8, 2004. Consequently, he is not included as a confirmed circuit court nominee during the G.W. Bush presidency. For a discussion of recess appointments, generally, see CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue.

¹⁶ For a discussion of some of these institutional and political factors, see CRS Report R43058, *President Obama's First-Term U.S. Circuit and District Court Nominations: An Analysis and Comparison with Presidents Since Reagan*, by Barry J. McMillion.

Standing Rules of the Senate after it has adjourned or been in recess for more than 30 days, and the President does not subsequently resubmit the nomination.

This report does not analyze or take a position on the number or percentage of a President's judicial nominees that would be appropriate for the Senate to confirm.

Table 1. U.S. Circuit and District Court Nominees: Number Nominated, Number Confirmed, and Percentage Confirmed

(January 20 of first year in office to June 30 of sixth year in office)

President	U.S. Circuit Courts			U.S. District Courts		
	Number Nominated	Number Confirmed	Percentage Confirmed	Number Nominated	Number Confirmed	Percentage Confirmed
Clinton	61	44	72.1	267	222	83.1
G.W. Bush	67	46	68.7	219	200	91.3
Obama	59	49	83.1	253	219	86.6

Source: Internal CRS judicial nominations database.

Notes: This table shows, from January 20 of a President's first year in office to June 30 of his sixth year in office, the number of nominees to U.S. circuit and district court judgeships, the number of nominees confirmed, and the percentage of nominees confirmed. Not included as a confirmed nominee is any individual who received a recess appointment by a President and who was not subsequently confirmed by the Senate prior to June 30 of that same President's sixth year in office.

U.S. Circuit Court Nominees

Table 1 reveals that, as of June 30 of his sixth year in office, President Obama had nominated the fewest number of individuals to U.S. circuit court judgeships but had both the greatest number and percentage of his U.S. circuit court nominees confirmed by the Senate. Of 59 nominees, 49 (or 83.1%) have, thus far, been confirmed.¹⁷

In contrast, President G.W. Bush had, by June 30 of his sixth year in office, nominated the greatest number of U.S. circuit court nominees (67) and also had the lowest percentage of nominees confirmed (68.7%). Additionally, President Clinton, by June 30 of his sixth year in office, had the lowest number of circuit court nominees confirmed (44).

During President Obama's second term, as of June 30, the Senate has confirmed 19 circuit court nominees, representing 38.8% of the 49 nominees confirmed thus far during his presidency. In comparison, during President G.W. Bush's second term (as of June 30 of his sixth year in office), the Senate had confirmed 11 circuit court nominees, representing 23.9% of the 46 nominees that had been confirmed by that point during his presidency. During President Clinton's second term (as of June 30 of his sixth year in office), the Senate had confirmed 14 circuit court nominees, representing 31.8% of the 44 nominees that had been confirmed by that point during his presidency.

¹⁷ Of the 10 nominees counted as not confirmed, 4 are currently before the Judiciary Committee or pending on the Senate *Executive Calendar*.

Confirmation of U.S. Circuit Court Nominees During a President's Sixth Year

Considering just the first half of a President's sixth year in office (from January 1 to June 30), President Obama has had 8 circuit court nominees confirmed, President G.W. Bush had 4 nominees confirmed, and President Clinton had 7 nominees confirmed.

As of June 30, 2014, there are 4 circuit court nominations that are either before the Senate Judiciary Committee or pending on the *Executive Calendar*. If, at a minimum, these 4 nominations are approved by the Senate prior to December 31, 2014, President Obama will have had at least 12 circuit court nominees confirmed during his sixth year in office, increasing the total number of circuit court nominees confirmed during his entire six years in office to 53.¹⁸

During the second half of President G.W. Bush's sixth year in office (from July 1, 2006, to December 31, 2006), the Senate confirmed an additional 5 circuit court nominees, bringing the total number of nominees confirmed during his six years in office to 51. During the second half of President Clinton's sixth year in office (from July 1, 1998, to December 1, 1998), the Senate confirmed an additional 6 circuit court nominees, bringing the total number of nominees confirmed during his six years to 50.

U.S. District Court Nominees

Table 1 shows that, as of June 30 of his sixth year in office, President Obama had nominated the second greatest number of individuals to U.S. district court judgeships and also had the second greatest number and percentage of his U.S. district court nominees confirmed by the Senate. Of 253 nominees, 219 (86.6%) have, thus far, been confirmed.¹⁹

President G.W. Bush had, by June 30 of his sixth year in office, nominated the fewest number of district court nominees (219) but had the highest percentage of nominees confirmed (91.3%). Additionally, President Clinton, by June 30 of his sixth year in office, had nominated the greatest number of district court nominees (267) and also had the greatest number confirmed (222). Note, however, that President Clinton also had the lowest percentage of his district court nominees confirmed by June 30 of his sixth year in office (83.1%).

During President Obama's second term, as of June 30, the Senate has confirmed 78 district court nominees, representing 35.6% of the 219 nominees confirmed thus far during his presidency. In contrast, during President G.W. Bush's second term (as of June 30 of his sixth year in office), the Senate had confirmed 32 district court nominees, representing 16.0% of the 200 nominees that had been confirmed by that point during his presidency. During President Clinton's second term (as of June 30 of his sixth year in office), the Senate had confirmed 53 circuit court nominees, representing 23.9% of the 222 nominees that had been confirmed by that point during his presidency.

Confirmation of U.S. District Court Nominees During a President's Sixth Year

Considering just the first half of a President's sixth year in office (from January 1 to June 30), President Obama has had 46 district court nominees confirmed, President G.W. Bush had 18 nominees confirmed, and President Clinton had 24 nominees confirmed.

¹⁸ The confirmation rate (i.e., the overall percentage of nominees confirmed) will depend upon how many nominations, if any, are submitted to the Senate by the end of President Obama's sixth year in office.

¹⁹ Of the 34 nominees counted as not confirmed, 26 (76.5%) are currently before the Judiciary Committee or pending on the Senate *Executive Calendar*.

As of June 30, 2014, there are 26 district court nominations that are either before the Senate Judiciary Committee or pending on the *Executive Calendar*. If, at a minimum, these 26 nominations are approved by the Senate prior to December 30, 2014, President Obama will have had at least 72 district court nominees confirmed during his sixth year in office (increasing the total number of district court nominees confirmed during his entire six years in office to 245).

In contrast, during the second half of President G.W. Bush's sixth year in office (from July 1, 2006, to December 31, 2006), the Senate confirmed an additional 3 district court nominees, bringing the total number of district court nominees confirmed during his six years in office to 203. During the second half of President Clinton's sixth year in office (from July 1, 1998, to December 1, 1998), the Senate confirmed an additional 26 district court nominees, bringing the total number of nominees confirmed during his six years to 248.

U.S. Circuit and District Court Nominees (Combined)

Overall, combining the data in **Table 1** for U.S. circuit and district court nominees, President Obama has had, as of June 30 of his sixth year in office, approximately the same percentage of nominees confirmed as President G.W. Bush (85.9% and 86.0%, respectively) and the greatest number of total nominees confirmed (268).

President Clinton had the second-greatest number of nominees confirmed (266) during the same period of his presidency, while President G.W. Bush had the fewest number of nominees confirmed (246). The 246 nominees confirmed during the first five and a half years of the G.W. Bush presidency is 22 and 20 fewer than the total number of nominees confirmed, respectively, during the comparable periods of time of the Obama and Clinton presidencies.

Total Nominees Confirmed During a President's Sixth Year

If, at a minimum, the 30 circuit and district court nominations that are currently pending in the Senate (either before the Judiciary Committee or on the *Executive Calendar*) are approved by the Senate by December 30, 2014, President Obama will have had at least a total of 298 nominees confirmed by the end of his sixth year in office. In contrast, by the end of President G.W. Bush's sixth year in office, the Senate had confirmed a total of 254 nominees, while by the end of President Clinton's sixth year in office, the Senate had confirmed a total of 298 nominees.

Pace of Confirmation of Judicial Nominees

This section of the report compares the pace of Senate confirmation of U.S. circuit and district court nominees as of June 30 of each President's sixth year in office.²⁰ Specifically, the figures below report the number of circuit and district court nominees confirmed, on average, per six-

²⁰ The pace by which the Senate confirms nominees might be measured in a number of ways. For the purposes of this report, the pace is calculated by dividing the number of nominees confirmed during a particular period of time (e.g., a President's first term) by the number of six-month intervals that fall within that period of time (e.g., there are eight six-month intervals during a President's first term).

month period during each President's (1) first term;²¹ (2) second term, up to June 30 of his sixth year; and (3) first and second term combined, up to June 30 of his sixth year.²²

A six-month period is used to calculate the pace of confirmation of judicial nominees because it is a long enough period of time to generate a statistic greater than one for U.S. circuit court nominations (which the Senate approves less frequently than district court nominations), but is also a short enough period of time to provide information related to how many judicial nominations have been confirmed by the Senate during a period of time that is less than a full calendar year.²³

The pace of confirmation of lower federal court nominees during any given year or presidential term might be affected by whether the Senate is also processing one or more nominations to the Supreme Court.²⁴ Of the Presidents included in the analysis, both of President Obama's appointees (Sonia Sotomayor and Elena Kagan) were confirmed during the first half of his first term (as were President Clinton's two nominees—Ruth Bader Ginsberg and Stephen Breyer), while both of President G.W. Bush's appointees (John G. Roberts, Jr. and Samuel A. Alito, Jr.) were confirmed during the first half of his second term.²⁵

Other factors that might influence the pace of confirmation of judicial nominees include how quickly the President submits nominations to the Senate; how quickly nominations are processed by the Judiciary Committee and sent to the full Senate for consideration; the length of time nominations remain pending on the *Executive Calendar* prior to final Senate action; the number

²¹ For the purposes of this report, the end of a President's first term is treated as December 31 of his fourth calendar year in office, while the beginning of his fifth year is treated as January 1 of his fifth calendar year in office. Operationalizing presidential terms in this manner allows for the analysis to coincide more closely with dates for which congressional action on judicial nominations might occur prior to the Senate adjourning *sine die*. An adjournment *sine die* is an adjournment that terminates an annual session of Congress.

²² Note that this methodology does not account for possible variation across calendar years in the number of days the Senate is in session and, thus, available to act on judicial nominations.

²³ Note that if another length of time was used to calculate the pace of confirmation of judicial nominees (e.g., number of nominees confirmed, on average, per three-month period), the number of nominees confirmed per that particular length of time would change but the overall "ranking" or ordering of the Presidents, in terms of the pace of approval of each President's nominees, would not change. So, for example, from January 20 of President Obama's first year in office to June 30 of his sixth year in office, the Senate approved 10.0 district court nominees, on average, every three months. During the comparable periods of time during the G.W. Bush and Clinton presidencies, the Senate approved 9.1 and 10.1 nominees, on average, per three-month period, respectively.

²⁴ In 1993, for example, President Clinton did not send his first district court nominations to the Senate until August 6. Likely delaying the President's initial selection of lower court nominees in 1993 was the March 19, 1993, announcement by Justice Byron R. White of his intention to retire from the Supreme Court when it adjourned for the summer. President Clinton engaged in a three-month search for Justice White's successor, announcing, on June 14, 1993, his selection of Ruth Bader Ginsburg as his Supreme Court nominee. For the President, selecting and nominating a person to fill a vacancy on the Supreme Court evidently took priority over providing the Senate with nominations to lower court judgeships. The Ginsburg nomination, in turn, was a primary object of attention for the Senate Judiciary Committee during June and July 1993, and subsequently as well for the Senate, which voted to confirm Justice Ginsburg on August 3, 1993, four days before the start of its August recess. As it had with the President, the Ginsburg nomination, for the Judiciary Committee and the Senate as a whole, presumably would have taken priority over lower court nominations had any been received prior to the Supreme Court nomination.

²⁵ See, for example, Sen. Chuck Grassley, "Executive Session," Remarks in the Senate, *Congressional Record*, daily edition, July 23, 2012, p. S5250 (comparing confirmation statistics of lower federal court nominations during the Obama and G.W. Bush presidencies in the context of Senate consideration of nominations to the Supreme Court during the same two presidencies).

of days the Senate is in session and available to act on nominations; and whether the Senate is focused on other matters, such as legislation or executive branch nominations.²⁶

Additionally, during President Obama's second term, both (1) the adoption of a new standing order for the 113th Congress (reducing post-cloture consideration of district court nominations from a maximum of 30 hours to 2 hours),²⁷ as well as (2) the Senate's reinterpretation of the application of Senate Rule XXII (lowering the vote threshold by which cloture can be invoked on some presidential nominations, including those to U.S. circuit and district court judgeships, from three-fifths of the Senate to a simple majority of those voting) may have affected the pace by which the full Senate has approved judicial nominations, particularly during President Obama's sixth year in office.²⁸

This report does not analyze or take a position on the pace by which it would be appropriate for the Senate to confirm a President's judicial nominees.

U.S. Circuit Court Nominees

Figure 1 shows the number of U.S. circuit court nominees confirmed, on average, per six-month period during a President's first term (over the course of 48 months). The number reported for a President's second term indicates the number of circuit court nominees confirmed, on average, per six-month period, as of June 30, during a President's second term (over the course of 18 months). Finally, the statistics reported for a President's entire five and a half years in office indicate the number of nominees confirmed, on average, per six-month period from January 20 of his first year to June 30 of his sixth year (over the course of 66 months).

As shown by **Figure 1**, when considering just a President's first term, President Obama had 3.7 circuit court nominees confirmed, on average, every six months (compared to 4.4 nominees confirmed, on average, every six months during President G.W. Bush's first term, and 3.7 nominees during President Clinton's first term).

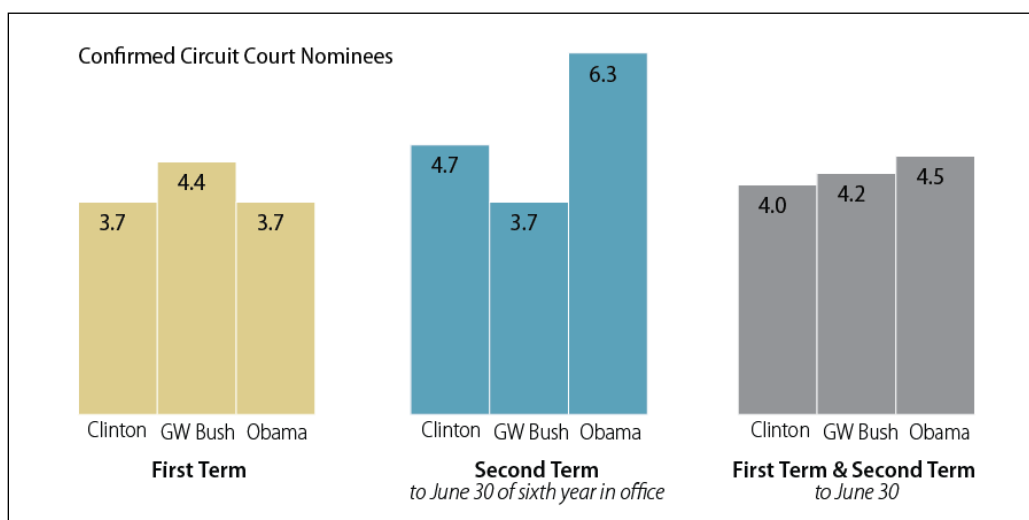
²⁶ These are just some factors that might influence the pace by which judicial nominations are approved; consequently, this paragraph is not intended to provide an exhaustive list of such factors.

²⁷ According to the standing order that, as of this writing, is just in effect for the 113th Congress, if cloture is invoked on a district court nomination in accordance with Rule XXII of the Senate, post-cloture consideration is reduced from a maximum of 30 hours to 2 hours. Historically, district court nominations have been considered pursuant to unanimous consent agreements, in part because of the greater amount of time necessary to consider them through the cloture process in the absence of unanimous consent. Note that U.S. circuit court nominations are not affected by the standing order.

²⁸ Note that while the new standing order was in effect for the entire first session of the 113th Congress, the reinterpretation of application of Senate Rule XXII to certain presidential nominations did not occur until near the end of the first session, on November 21, 2013. A causal analysis of how these recent changes might have affected the speed by which the Senate took final action on judicial nominations is beyond the scope of this report.

Figure 1. Number of U.S. Circuit Court Nominees Confirmed, On Average, Per Six-Month Period During First and Second Presidential Term

(Second term, as of June 30 of sixth year in office)

**Source:** Internal CRS judicial nominations database.

Notes: This figure shows, for Presidents Obama, G.W. Bush, and Clinton, the number of U.S. circuit court nominees confirmed, on average, per six-month period during a President's first term (over the course of 48 months). The number reported for a President's second term indicates the number of circuit court nominees confirmed, on average, per six-month period, as of June 30, during a President's second term (over the course of 18 months). The statistics reported for a President's first and second term indicate the number of nominees confirmed, on average, per six-month period from January 20 of his first year in office to June 30 of his sixth year (over the course of 66 months).

Considering just a President's second term, 6.3 circuit court nominees have been confirmed, on average, per six-month period during President Obama's second term (up to June 30, 2014). This is the greatest number of circuit court judges approved by the Senate, on average, for any six-month period during any of the three Presidents' first or second terms.

The pace of circuit court confirmations during President G.W. Bush's second term (up to June 30, 2006) was, on average, 3.7 nominees per six-month period, while the pace of circuit court confirmations during President Clinton's second term (up to June 30, 1998) was, on average, 4.7 nominees per six-month period. President G.W. Bush is the only President of the three for whom the pace of confirmation for circuit court nominees slowed from his first term to June 30 of the sixth year of his second term.

Finally, **Table 1** shows that, from January 20 of President Obama's first year in office to June 30 of his sixth year in office, the Senate confirmed, on average, 4.5 circuit court nominees every six months. This is the greatest number of circuit court judges approved by the Senate, on average, every six months during the overall period from January 20 of a President's first year in office to June 30 of a President's sixth year in office. The comparable statistics for Presidents G.W. Bush and Clinton are 4.2 and 4.0, respectively.

U.S. District Court Nominees

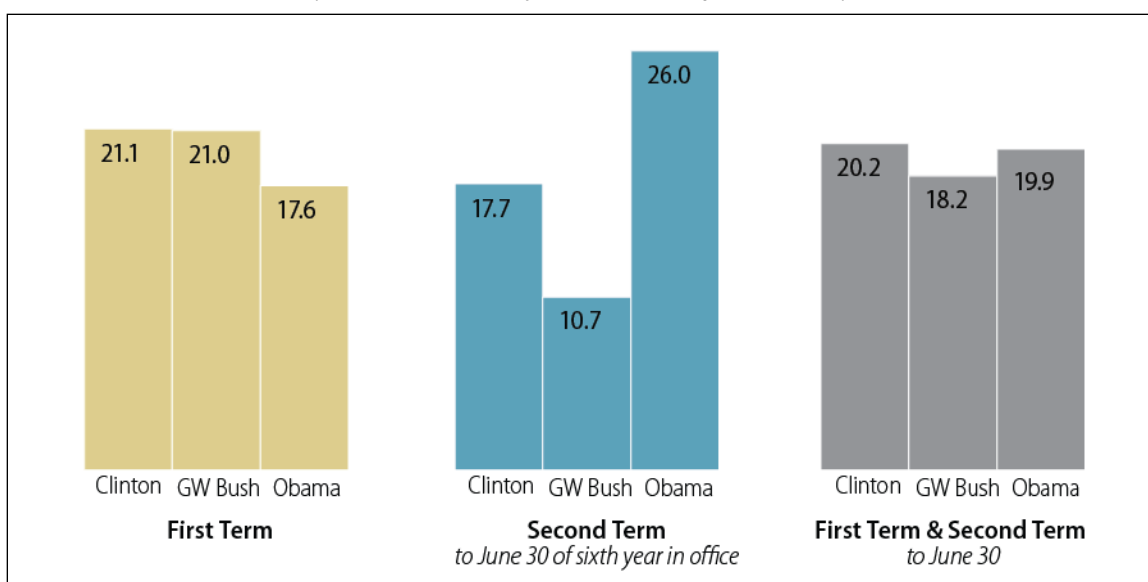
Figure 2 shows the number of U.S. district court nominees confirmed, on average, per six-month period during a President's first term (i.e., over the course of 48 months). The number reported for a President's second term indicates the number of district court nominees confirmed, on average, per six-month period, as of June 30, during a President's second term (over the course of

18 months). Finally, the statistics reported for a President's entire five and a half years in office indicate the number of nominees confirmed, on average, per six-month period from January 20 of his first year to June 30 of his sixth year (over the course of 66 months).

As shown by **Figure 2**, when considering just a President's first term, President Obama had 17.6 district court nominees confirmed, on average, every six months (compared to 21.0 nominees confirmed, on average, every six months during President G.W. Bush's first term, and 21.1 such nominees during President Clinton's first term).

Figure 2. Number of U.S. District Court Nominees Confirmed, On Average, Per Six-month Period During First and Second Presidential Term

(Second term, as of June 30 of sixth year in office)



Source: Internal CRS judicial nominations database.

Notes: This figure shows, for Presidents Obama, G.W. Bush, and Clinton, the number of U.S. district court nominees confirmed, on average, per six-month period during a President's first term (over the course of 48 months). The number reported for a President's second term indicates the number of district court nominees confirmed, on average, per six-month period, as of June 30, during a President's second term (over the course of 18 months). The statistics reported for a President's first and second term indicate the number of nominees confirmed, on average, per six-month period from January 20 of his first year to June 30 of his sixth year (over the course of 66 months).

Considering just a President's second term, 26.0 district court nominees have been confirmed, on average, per six-month period during President Obama's second term (up to June 30, 2014). As with the confirmation of circuit court nominees during President Obama's second term, this is the greatest number of district court judges approved by the Senate, on average, for any six-month period during any of the three Presidents' first or second terms.

The pace of district court confirmations during President G.W. Bush's second term (up to June 30 of his sixth year in office) was, on average, 10.7 nominees per six-month period, while the pace of district court confirmations during President Clinton's second term (up to June 30) was, on average, 17.7 nominees per six-month period. The number of district court nominees confirmed, on average, per six-month period during President G.W. Bush's second term was the slowest pace of Senate approval of district court nominations during any of the three Presidents' first or second terms.

Finally, **Figure 2** shows that, from January 20 of President Obama's first year in office to June 30 of his sixth year in office, the Senate confirmed, on average, 19.9 district court nominees every six months. This is the second-greatest number of district court judges approved by the Senate, on average, every six months during the overall period from January 20 of a President's first year in office to June 30 of a President's sixth year in office. The comparable statistics for Presidents G.W. Bush and Clinton are 18.2 and 20.2, respectively.

U.S. Circuit and District Court Nominees (Combined)

Overall, combining the data in **Table 1** and **Table 2** for U.S. circuit and district court nominations, President Obama had, on average, 21.4 U.S. circuit and district court nominees confirmed per six-month period during his first term. The comparable statistics for Presidents G.W. Bush and Clinton are 25.4 and 24.9, respectively.

During President Obama's second term, 32.3 circuit and district court nominees have been confirmed, on average, every six months. This is the greatest number of total nominees confirmed, on average per six-month period, during any of the three Presidents' terms (up to June 30 of a President's sixth year). In contrast, during President G.W. Bush's second term, 14.3 circuit and district court nominees were confirmed, on average, every six months (the lowest number per six-month period for any of the three Presidents). During President Clinton's second term, 22.3 circuit and district court nominees were confirmed, on average, every six months.

Overall, from January 20 of his first year to June 30 of his sixth year, President Obama had 24.4 circuit and district court nominees confirmed, on average, per six-month period. The comparable statistics for Presidents G.W. Bush and Clinton were 22.4 and 24.2, respectively.

Judicial Vacancies

The percentage of vacant circuit and district court judgeships varies over the course of a presidency and is affected, in part, by the pace at which a President selects nominees for vacancies as well as the speed by which the Senate considers a President's nominees.²⁹

The number of vacancies that exists during a presidency might also affect the statistics discussed in the two preceding sections (i.e., how many nominations are approved by the Senate during any given period of time, as well as the pace by which the Senate confirms a President's nominees).

Table 2 compares, for Presidents Obama, G.W. Bush, and Clinton, (1) the percentage of U.S. circuit and district court judgeships vacant on January 1 of a President's fifth year in office; (2) the percentage of such judgeships vacant on June 30 of a President's sixth year in office; and (3) the change in the percentage of vacant U.S. circuit and district court judgeships from January 1 of a President's fifth year to June 30 of his sixth year.³⁰ Note that a negative value in the "change"

²⁹ The percentage of circuit (or district) court judgeships that are vacant on any given date is calculated by dividing the number of circuit (or district) court vacancies that exist on a date by the number of authorized circuit (or district) court judgeships existing on that same date. Vacancies data provided by internal CRS vacancies database and the Administrative Office of U.S. Courts at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx>.

³⁰ For the purposes of this report, the beginning of a President's fifth year in office is treated as January 1 (rather than January 20) of the fifth calendar year of his presidency. Operationalizing a President's fifth year in this manner allows for the analysis to coincide more closely with dates for which congressional action on judicial nominations might occur, prior to the Senate adjourning *sine die*. An adjournment *sine die* is an adjournment that terminates an annual session of Congress.

column means that the vacancy rate declined as a result of fewer judgeships being vacant on June 30 of a President's sixth year in office than on January 1 of his fifth year.

Table 2. Percentage of U.S. Circuit and District Court Judgeships Vacant on January 1 of President's Fifth Year in Office and June 30 of Sixth Year in Office

President	U.S. Circuit Court Judgeships			U.S. District Court Judgeships		
	Jan. 1 (5 th Year)	June 30 (6 th Year)	Change	Jan. 1 (5 th Year)	June 30 (6 th Year)	Change
Clinton	12.8	10.6	-2.2	10.0	7.9	-2.1
G.W. Bush	8.4	8.9	+0.5	3.1	4.3	+1.2
Obama	8.9	5.6	-3.3	8.8	7.3	-1.5

Source: Internal CRS judicial vacancies database; CRS analysis of data provided by the Administrative Office of U.S. Courts.

Notes: This table shows the percentage of U.S. circuit and district court judgeships vacant on January 1 of each President's fifth year in office, on June 30 of each President's sixth year, and the change between the two dates. A negative value in the "change" column means that the vacancy rate declined as a result of fewer judgeships being vacant on June 30 of a President's sixth year in office than on January 1 of his fifth year.

U.S. Circuit Court Vacancies

Table 2 reveals that the percentage of circuit court judgeships that were vacant at the beginning of a President's fifth year in office was greatest during the Clinton presidency (12.8%). As of June 30 of a President's sixth year in office, the percentage of circuit court vacancies was also greatest during the Clinton presidency (10.6%).

For Presidents Clinton and Obama, there was a smaller percentage of vacant judgeships on June 30 of each President's sixth year in office than on January 1 of his fifth year in office. The percentage of vacant judgeships declined the most for President Obama, falling 3.3 percentage points from 8.9% to 5.6%. The percentage of circuit court judgeships that are vacant is, as of June 30, 2014, at its lowest point since August 2008.³¹ The percentage of vacant circuit court judgeships increased from January 1 of President G.W. Bush's fifth year in office to June 30 of his sixth year (8.4% and 8.9%, respectively).

U.S. District Court Vacancies

As with circuit court vacancies, the percentage of vacant district court judgeships on January 1 of a President's fifth year was greatest during the Clinton presidency (10.0%). The percentage of vacant district court judgeships on January 1 of President G.W. Bush's and Obama's fifth years in office was 3.1% and 8.8%, respectively.

From the beginning of a President's fifth year to June 30 of his sixth year, the percentage of vacant district court judgeships declined during both the Clinton and Obama presidencies (-2.1% and -1.5%, respectively). In contrast, the percentage of vacant district court judgeships increased from the beginning of the fifth year to June 30 of the sixth year of the G.W. Bush presidency (+1.2%). The G.W. Bush presidency is the only one of the three for which the percentage of both vacant circuit and district court judgeships increased (albeit slightly for circuit judgeships) from January 1 of his fifth year in office to June 30 of his sixth year.

³¹ CRS analysis of data provided by the Administrative Office of U.S. Courts; internal CRS judicial vacancies database.

Although the Senate has, as of June 30, 2014, confirmed 78 district court nominees during President Obama's second term (compared to 32 and 53 district court nominees confirmed, respectively, as of June 30, during the second terms of Presidents G.W. Bush and Clinton), the district court vacancy rate has declined by less than two percentage points from January 1 of President Obama's fifth year in office to June 30 of this sixth year. This is due, in part, to the number of relatively new district court vacancies occurring since January 1, 2014. Of the 49 district court judgeships that were vacant as of June 30, 2014, 16 (32.7%) became vacant after January 1 of this year.³²

Author Information

Barry J. McMillion
Analyst on the Federal Judiciary

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

³² If the 16 relatively recent district court vacancies (i.e., since January 1, 2014) are not included in the calculation, the district court vacancy rate would decrease nearly four percentage points to 4.9%.